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No. 02-49

IN THE
Supreme Court of the United States

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Petitioner,

v.

TAMIAMI PARTNERS, LIMITED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

JOSEPH M. MATTHEWS
MARC COOPER
COLSON HICKS EIDSON, P.A.
255 Aragon Avenue
Second Floor
Coral Gables, Florida 33134
(305) 476-7400

*Counsel of Record

JOHN G. ROBERTS, JR.*
CATHERINE E. STETSON
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to review dictum in a footnote in a 1999 Eleventh Circuit opinion.

2. Whether this Court should grant certiorari to review the question whether a nonmember seeking to compel an arbitral remedy must first "exhaust tribal remedies," when that question was not pressed or passed upon below.

3. Whether this Court should grant certiorari to review the question under what circumstances a tribal court may exercise jurisdiction over claims brought by an Indian tribe against nonmembers, when the question is not presented on the facts of this case.

RULE 29.6 STATEMENT

Respondent Tamiami Partners, Ltd. ("Tamiami") is a limited partnership. Tamiami has no parent corporation, and no publicly held company owns 10% or more of Tamiami's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
COUNTERSTATEMENT	3
REASONS FOR DENYING THE WRIT	17
I. THIS COURT SHOULD DECLINE TO GRANT REVIEW OF DICTUM IN A FOOTNOTE IN *TAMIAMI III*	18
II. PETITIONER'S CHALLENGES TO THE CONFIRMATION OF THE ARBITRAL AWARD WERE EITHER NOT RAISED BELOW OR NOT PRESENTED IN THE CASE	24
A. The Question Whether Tamiami Was Obligated To "Exhaust Tribal Remedies" Was Not Pressed Or Passed Upon Below.	24
B. The Question To What Extent A Tribal Court May Adjudicate A Tribe's Claims Against Non-Members Is Not Presented In This Case	27
CONCLUSION	29

TABLE OF AUTHORITIES

Page

CASES:

Abdo v. *Fort Randall Casino*, 957 F. Supp. 1111 (D.S.D. 1997) 23

Barnard v. *Commercial Carriers, Inc.*, 863 F.2d 694 (10th Cir. 1988) 26

Becenti v. *Vigil*, 902 F.2d 777 (10th Cir. 1990) 25

Bruce H. Lien Co. v. *Three Affiliated Tribes*, 93 F.3d 1412 (8th Cir. 1996) 19,22

C & L Enters., Inc. v. *Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001) 27

Cabazon Band of Mission Indians v. *Wilson*, 124 F.3d 1050 (9th Cir. 1997), *cert. denied*, 524 U.S. 926 (1998) 23

Calvello v. *Yankton Sioux Tribe*, 899 F. Supp. 431 (D.S.D. 1995) 23

Casino Res. Corp. v. *Harrah's Entm't, Inc.*, 243 F.3d 435 (8th Cir. 2001) 4

Caterpillar Inc. v. *Williams*, 482 U.S. 386 (1987) 9

Columbia Gas Trans. Corp. v. *Drain*, 191 F.3d 552 (4th Cir. 1999) 22

Continental Materials Corp. v. *Gaddis Mining Co.*, 306 F.2d 952 (10th Cir.1962) 26

TABLE OF AUTHORITIES—Continued

Page

Dean Witter Reynolds, Inc. v. *Sanchez Espada*, 959 F. Supp. 73 (D.P.R. 1997) 21

Diamond Game Enters., Inc. v. *Reno*, 9 F. Supp. 2d 13 (D.D.C. 1998), *rev'd on other grounds*, 230 F.3d 365 (D.C. Cir. 2000) 4,23

Franchise Tax Bd. v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983) 9,18,21

FW/PBS, Inc. v. *City of Dallas*, 493 U.S. 215 (1990) 25

Gaming Corp. of Am. v. *Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996) 4

Gibraltar, P.R., Inc. v. *Otoki Group., Inc.*, 104 F.3d 616 (4th Cir. 1997) 20

Johnson v. *University of Wisconsin-Milwaukee*, 783 F.2d 59 (7th Cir. 1986) 26

Juidice v. *Vail*, 430 U.S. 327 (1977) 26

Lindy v. *Lynn*, 501 F.2d 1367 (3d Cir. 1974) 22

McDonald v. *City of West Branch*, 466 U.S. 284 (1984) 26

Merrell Dow Pharms. v. *Thompson*, 478 U.S. 804 (1986) 9,18

Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. *Haydu*, 637 F.2d 391 (5th Cir. Unit B Feb. 1981) 14

TABLE OF AUTHORITIES—Continued

	Page
Milan Express Co. v. *Western Surety Co.*, 886 F.2d 783 (6th Cir. 1989)	22
Mirson v. *Corradino Group., Inc.*, 751 So. 2d 699 (Fla. 3d Dist. Ct. App 2000)	17
Missouri River Servs., Inc. v. *Omaha Tribe of Neb.*, 267 F.3d 848 (8th Cir. 2001), *cert. denied*, 122 S. Ct. 1909 (2002)	4
National Farmers Union Ins. Cos. v. *Crow Tribe*, 471 U.S. 845 (1985)	25,26
Nevada v. *Hicks*, 533 U.S. 353 (2001)	27,28
Platzer v. *Sloan-Kettering Inst. for Cancer Research*, 787 F. Supp. 360 (S.D.N.Y.), *aff'd*, 983 F.2d 1086 (Fed. Cir. 1992), *cert. denied*, 507 U.S. 1006 (1993)	22
Pueblo of Santa Ana v. *Kelly*, 104 F.3d 1546 (10th Cir.), *cert. denied*, 522 U.S. 807 (1997)	22
Rita, Inc. v. *Flandreau Santee Sioux Tribe*, 798 F. Supp. 586 (D.S.D. 1992)	23
Rogers v. *United States*, 522 U.S. 252 (1998)	27
Ross v. *Flandreau Santee Sioux Tribe*, 809 F. Supp. 738 (D.S.D. 1992)	23
Smith v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921)	21

TABLE OF AUTHORITIES—Continued

	Page
New Mexico v. *Pueblo of Pojoaque*, 30 Fed. Appx. 768 (10th Cir. 2002)	23
T. B. Harms Co. v. *Eliscu*, 339 F.2d 823 (2d Cir. 1964), *cert. denied*, 381 U.S. 915 (1965)	18,22
Tamiami Partners, Ltd. v. *Miccosukee Tribe of Indians of Fla.*, 999 F.2d 503 (11th Cir. 1993)	4
Tamiami Partners, Ltd. v. *Miccosukee Tribe of Indians of Fla.*, 63 F.3d 1030 (11th Cir. 1995)	4
Tamiami Partners, Ltd. v. *Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212 (11th Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000)	4
The Monrosa v. *Carbon Black Export, Inc.*, 359 U.S. 180 (1959)	27
Tom's Amusement Co. v. *Cuthbertson*, 816 F. Supp. 403 (W.D.N.C. 1993)	23
West 14th Street Commercial Corp. v. *5 West 14th Owners Corp.*, 815 F.2d 188 (2d Cir.), *cert. denied*, 484 U.S. 850 (1987)	22
Willis v. *Fordice*, 850 F. Supp. 523 (S.D. Miss. 1994), *aff'd*, 55 F.3d 633 (5th Cir. 1995)	23

TABLE OF AUTHORITIES—Continued

	Page
STATUTES:	
9 U.S.C. § 4	19
25 U.S.C. § 2701 *et seq.*	2,3
25 U.S.C. § 2701(3)	4
25 U.S.C. § 2702(1)	3
25 U.S.C. § 2702(3)	3
25 U.S.C. § 2703(6)	4
25 U.S.C. § 2703(7)	4
25 U.S.C. § 2704	4
25 U.S.C. § 2705(a)(4)	4
25 U.S.C. § 2706(b)(1)	4
25 U.S.C. § 2706(b)(10)	5
25 U.S.C. § 2709	6
25 U.S.C. § 2710(a)(1)	4
25 U.S.C. § 2710(b)	7
25 U.S.C. § 2710(b)(2)(F)(i)	5
25 U.S.C. § 2710(b)(2)(F)(ii)	5
25 U.S.C. § 2711	4
25 U.S.C. § 2711(b)(1), (6)	5
28 U.S.C. § 1337(a)	22
Fla. Stat. § 682.03	17,24
Fla. Stat. § 682.03(4)	24

IN THE

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Petitioner,

v.

TAMIAMI PARTNERS, LIMITED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

Respondent Tamiami Partners, Limited ("Tamiami") respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

INTRODUCTION

This marks petitioner's second petition for certiorari in this case, this time from the fourth opinion the Eleventh Circuit Court of Appeals has rendered in the course of this decade-long litigation. The petition should be denied, just as the first one was, and this case brought to a long-overdue conclusion.

An understanding of the particular facts underlying this dispute and the "lengthy procedural history of this case," Pet. App. 2a, is essential to a proper appreciation of what the

court below decided and what questions are properly before this Court. Respondent Tamiami, along with its partner Tamiami Development Corporation, entered into an agreement with petitioner Miccosukee Tribe of Indians of Florida (the "Tribe") under which Tamiami would buy a parcel of land, deed it to the Tribe, and build and operate a bingo facility there, in exchange for a share of the facility's revenues. The parties' management agreement was governed by the Indian Gaming Regulation Act ("IGRA"), a federal statute that preempts the field of Indian gaming. *See* 25 U.S.C. § 2701 *et seq*. IGRA's detailed implementing regulations similarly governed the procedures for issuing licenses necessary for the operation of the bingo facility. *See* 25 C.F.R. §§ 501-577.15.

After Tamiami bought the land, deeded it to the Tribe, and built the gaming facility, the Tribe twice attempted to purchase Tamiami's interest in the operation, first offering less than, and then the same amount as, Tamiami's initial investment. When Tamiami rejected those offers, the Tribe declared Tamiami to be in breach of the parties' management agreement and purported to terminate the agreement; it subsequently denied Tamiami the gaming licenses it needed to operate Miccosukee Indian Bingo and evicted it from the facility. Asserting that the Tribe had denied its applications for gaming licenses in bad faith in order to gain control of the bingo facility, Tamiami sued the Tribe in federal district court to enforce the terms of the parties' management agreement, which required the parties to arbitrate their claims.

The Eleventh Circuit unanimously concluded that Tamiami's claims presented a federal question because they arose under IGRA and its implementing regulations. The Court of Appeals denied rehearing en banc without recorded dissent. The Tribe filed a petition for writ of certiorari, which this Court denied. The Tribe sought rehearing from this Court's denial of certiorari, which was also denied. On remand, the District Court enforced a $9.5 million arbitral award in favor

of Tamiami, plus prejudgment interest, in satisfaction of Tamiami's claims against the Tribe. The Eleventh Circuit affirmed in an unpublished, per curiam opinion and again unanimously denied rehearing en banc. The Tribe again seeks certiorari review.

Nothing has changed since the Tribe's last petition. The Eleventh Circuit has not decided an "important question of federal law" in a way that "conflicts with relevant decisions of this Court" or of the courts of appeal. S. Ct. Rule 10. To the contrary: in each of its decisions in this case, the Eleventh Circuit faithfully applied this Court's precedents to the specific facts and evolving claims before it. *See id.* ("A petition for writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law."). Nor did the Eleventh Circuit precipitate a conflict with this Court's case law or that of any other circuit—much less err—in declining to recognize a tribal court's authority to "stay" the arbitration proceedings. Nor does the case present an opportunity to resolve a question this Court has declined to take up in the past—the extent to which tribal courts may generally exercise jurisdiction over non-members—because that issue simply is not presented on the facts of this case. The petition should be denied and an end put to the "contentious litigation conduct" of the Tribe. Pet. App. 6a.

COUNTERSTATEMENT

A. Statutory and Regulatory Background.

The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, regulates gaming operations on Indian lands. The Act declares that "the establishment of independent Federal regulatory authority for gaming on Indian lands [and] the establishment of Federal standards for gaming on Indian lands * * * are necessary to meet Congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue." 25 U.S.C. § 2702(3).

In keeping with Congress's intent to provide federal "standards or regulations for the conduct of gaming on Indian lands," 25 U.S.C. § 2701(3), IGRA is a comprehensive statute, designed to "expressly preempt the field" of law governing Indian gaming. S. Rep. No. 446 at 6 (1988); *see also Casino Res. Corp.* v. *Harrah's Entm't, Inc.*, 243 F.3d 435, 437 (8th Cir. 2001); *Gaming Corp. of Am.* v. *Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996) (IGRA completely preempts the field of Indian gaming); *Tamiami Partners, Ltd.* v. *Miccosukee Tribe of Indians of Fla.*, 63 F.3d 1030, 1033 (11th Cir. 1995) ("*Tamiami II*") (IGRA "provide[s] for extensive federal oversight of all but the most rudimentary forms of Indian gaming").

The Act regulates two types of gaming activities. "Class II" gaming—the type involved in this case—includes games of chance like bingo. *See* 25 U.S.C. § 2703(7).[1] The National Indian Gaming Commission, an entity created by IGRA, monitors Class II gaming conducted on Indian lands "on a continuing basis." *Id.* § 2706(b)(1); *see id.* § 2704 (establishing Commission and enumerating its powers). Before a Tribe contracts with a gaming operator to manage a Class II gaming facility, the Tribe must submit the contract to the Chairman of the Gaming Commission for approval. *Id.* § 2705(a)(4); *see Missouri River Servs., Inc.* v. *Omaha Tribe of Nebraska*, 267 F.3d 848, 850 (8th Cir. 2001), *cert. denied*, 122 S. Ct. 1909 (2002). The Act conditions approval of

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[1] IGRA does not apply to "Class I" gaming, which encompasses "social games solely for prizes of minimal value or traditional forms of Indian gaming." 25 U.S.C. §§ 2703(6), 2710(a)(1); *see Diamond Game Enters., Inc.* v. *Reno*, 230 F.3d 365, 367 (D.C. Cir. 2000). "Class III" gaming, which is regulated by IGRA, includes all forms of gaming not covered by the first two designations, including slot machines, parimutuel wagering, roulette, and blackjack. *See Diamond Game Enters.*, 230 F.3d at 367; 25 C.F.R. § 502.4(a)-(d).

Class II management contracts on satisfaction of a number of detailed prerequisites. *Id.* § 2711.[2]

The Act also governs a Tribe's licensing of a Class II management contractor and its employees. Section 2710 requires that a Tribe conduct background investigations of the "primary management officials and key employees of the gaming enterprise" and maintain ongoing oversight of those officials and employees. *Id.* § 2710(b)(2)(F)(i). Tribes are required to institute procedures for licensing managers and key employees, and to notify the Commission of the results of all background investigations before issuing gaming licenses. *Id.* § 2710(b)(2)(F)(ii).

Pursuant to IGRA's mandate, *see* 25 U.S.C. § 2706(b)(10), the Commission promulgated extensive regulations to implement the Act. *See* 25 C.F.R. §§ 501-577.15. The regulations include detailed specifications governing, among other things, procedures for approval of management contracts for Class II gaming enterprises, and procedures for licensing Class II managers and employees. *See* 25 C.F.R. §§ 531, 533, 535, 537, 556, 558.

B. Factual Background.

Because petitioner's current arguments directly implicate the Eleventh Circuit's prior decisions in this lengthy case, the factual and procedural background of this case warrant detailed treatment.

1. The Lawsuit. The Miccosukee Tribe of Indians of Florida (the "Tribe") is a federally-recognized Indian tribe. In April 1989, the Tribe entered into a Management Agree-

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[2] To be approved by the Chairman, a proposed management contract must include provisions for, among other things, "adequate accounting procedures" and "verifiable financial reports," minimum guaranteed payments to the Tribe, and "grounds and mechanisms for terminating [the] contract." *Id.* § 2711(b)(1), (6).

ment with Tamiami Development Corporation ("Tamiami Development") to build and operate a bingo facility. In exchange for a fixed percentage of the facility's revenues, Tamiami Development agreed that it would purchase a parcel of land outside the Miccosukee reservation, convey the real estate to the United States in trust for the Tribe, and design, construct, and manage the gaming facility.

Article 12 of the Agreement provided that "[a]ll disputes, controversies and/or claims arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration." Pet. App. 130a. Article 23 of the Agreement waived the Tribe's sovereign immunity from suit in the United States District Court for the Southern District of Florida to enforce the terms of the Management Agreement "upon one or both of the following events[:] (i) [the Tribe] fails to participate in an arbitration proceeding invoked as provided in Article 12, or (ii) failure by [the Tribe] to abide by the terms of an arbitration award." *Id.* at 131a.

The Tribe submitted the Agreement to the Secretary of the Interior for approval, as IGRA required. *See* 25 U.S.C. § 2709. Following the Secretary's approval, and pursuant to the Agreement, Tamiami Development purchased a large parcel of land, deeded it to the United States in trust for the Tribe, and built a bingo facility on the land. Tamiami Development invested approximately $6.5 million in the land and its improvements.

The Miccosukee bingo enterprise, called Miccosukee Indian Bingo, began operating in September 1990.[3] In August 1991, again as IGRA required, the Tribe passed an ordinance

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[3] In January 1990, the parties effected a novation of the Management Agreement, substituting respondent Tamiami for Tamiami Development. Tamiami Development remained associated with the enterprise as Tamiami's general partner. The Secretary of the Interior approved the novation, as IGRA requires.

establishing a Tribal Gaming Agency to oversee the Tribe's gaming enterprises, including Miccosukee Indian Bingo. *See* 25 U.S.C. § 2710(b). The ordinance governed the background investigation, registration, and licensing of the gaming enterprises' managers and employees, and required the Tribal Gaming Agency to notify the National Indian Gaming Commission of the results of each background investigation. Under the Tribal ordinance, the denial of a license application resulted in termination of employment and eviction from the Tribe's gaming facility.

From September 1990—when Miccosukee Indian Bingo opened its doors—through January 1992, the Tribe twice attempted to buy out Tamiami's interest in the facility. The Tribe's first offer was for two million dollars *less* than Tamiami had invested in the project; the second was for the same amount as Tamiami's investment. Tamiami refused both offers. *See* Pet. App. 134a-135a.

In late January 1992, after the rejection of its second offer to buy out Tamiami, the Tribe notified Tamiami that the Management Agreement would be terminated in thirty days, purportedly because Tamiami had committed various unspecified " 'violations of the letter and spirit of the Agreement.' " *Id.* at 135a (quoting termination letter). Invoking the Management Agreement, Tamiami formally requested arbitration of the dispute to determine the validity of the Tribe's notice of termination. The Tribe did not respond to Tamiami's request; instead, it filed suit in Miccosukee Tribal Court against Tamiami, seeking, among other things, a declaration that it had validly terminated the Management Agreement and an order directing Tamiami to vacate the bingo facility. *See id.* at 135a-136a.

The day before the Tribe was to terminate the Management Agreement, Tamiami sued the Tribe in federal district court for the Southern District of Florida, challenging the impending termination. Tamiami's original complaint sought a

declaratory judgment that the Agreement required the parties to settle disputes by arbitration and an injunction compelling the Tribe to arbitrate the termination dispute and preventing the Tribe from taking control of Miccosukee Indian Bingo before arbitration had run its course. *See* Pet. App. 202a & n.4. The District Court concluded that it had jurisdiction over Tamiami's claims but stayed them pending resolution of the parallel tribal court proceeding, warning that it would lift the stay if the Tribe attempted to impede Tamiami's operations or to evict Tamiami from the facility. *Id.* at 203a-204a.

After the District Court stayed Tamiami's suit, the parties proceeded to arbitration, as the Management Agreement provided. An arbitration panel was convened in late 1992. *See* Pet. App. 147a.

Several months after the District Court stayed Tamiami's action, the Tribal Gaming Agency denied a number of license applications filed by Tamiami managers and other key employees and evicted those employees from the Miccosukee Indian Bingo facility. Because the Tribe's denial of the license applications violated IGRA and its implementing regulations and effectively precluded Tamiami from operating Miccosukee Indian Bingo, Tamiami moved in the District Court to lift the stay and for injunctive relief to prohibit the Gaming Agency from denying licenses to additional employees. *See id.* at 140a-141a.

The District Court concluded that the Tribe's licensing process was "arbitrary and capricious" but denied Tamiami's motion for injunctive relief, finding that IGRA did not provide for contractors like Tamiami to directly challenge a tribe's licensing procedures, and that in any event, the Tribe's waiver of sovereign immunity in the Management Agreement did not extend to federal suits challenging its licensing procedures. *Id.* at 142a. Tamiami took an interlocutory appeal to the Eleventh Circuit from the District Court's order.

While Tamiami's appeal was pending, the Tribe again resorted to self-help in its attempt to take over the bingo facility. In April 1993, the Tribal Gaming Agency denied gaming licenses to Tamiami, Tamiami Development, and two of Tamiami's principal officers, evicted Tamiami from the bingo facility, and appointed a conservator, who began withholding Tamiami's share of revenues from the gaming operation. *Id.* at 144a. Tamiami again sought emergency relief in the District Court from the Tribe's tactics; this time, the District Court granted Tamiami's motion and ordered the parties to return to the status quo that had existed before the Tribe denied the licenses and appointed a conservator. *Id.* at 144a-145a. The Tribe appealed the District Court's ruling. Its appeal was consolidated with Tamiami's.

2. ***Tamiami I.*** The Eleventh Circuit concluded that the District Court lacked jurisdiction over Tamiami's complaint because the complaint did not state a federal question. Pet. App. 200a-213a ("*Tamiami I*"). Quoting this Court's decisions in *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U.S. 804, 808 (1986) and *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 9-10 (1983), the Eleventh Circuit explained that "the question whether a claim 'arises under' federal law must be determined by reference to the 'well-pleaded complaint.' " Pet. App. 208a. Under the "well-pleaded complaint rule," federal question jurisdiction " 'exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.' " *Id.* (quoting *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 392 (1987)).

The Court of Appeals concluded that Tamiami's complaint on its face did not establish the existence of a federal question, because the complaint, grounded on the Tribe's attempt to terminate its Management Agreement with Tamiami, presented only "facts establishing a breach of contract claim." Pet. App. 209a. The Eleventh Circuit observed, however, that "events had occurred" after the filing of

Tamiami's complaint—namely, the Tribe's subsequent denial of Tamiami's gaming licenses in violation of IGRA and its regulations—"that suggested a basis for district court jurisdiction." *Id.* at 212a. Because those more recent "facts * * * suggest[ed] that the district court could have jurisdiction," the Court of Appeals remanded the case with directions to dismiss the action unless either party filed a complaint properly alleging federal jurisdiction. *Id.* at 212a-213a.

3. The Amended Complaint. On remand, Tamiami filed an amended complaint against the Tribe and several individual members of the Tribe's Business Council and Gaming Agency. *See* Pet. App. 147a. The amended complaint stated three basic claims: one claim that the Tribe had breached the Management Agreement by evicting Tamiami from Miccosukee Indian Bingo and taking control of the enterprise, and two claims brought directly under IGRA alleging that the Tribe and the individual defendants had abused their licensing authority under the statute by refusing to license Tamiami and its officials. *Id.* at 153a-154a.

4. The Arbitration Award. Tamiami filed its amended complaint in September 1993, shortly before the arbitration panel was to hold its final hearing. *See id.* at 147a. One day after Tamiami filed its amended complaint, the Tribe moved in tribal court to stay the arbitration proceedings, and the tribal court granted the motion. *Id.* at 147a-148a. Concluding that it derived its authority from the Management Agreement—not from the tribal court—the arbitration panel held a final hearing in which the Tribe's arbitrator chose not to participate. *Id.* at 148a; *see* Ct. App. J.A. Doc. 311, Ex. 5 (Order Declining To Postpone Final Hearing) at 1 (" 'The authority of an arbitration tribunal is derived exclusively from the contract or document creating the panel.' ")(quoting Miccosukee Tribe Pre-Hearing Memorandum at 3).

In October 1993, a majority of the arbitration panel issued a decision in favor of Tamiami, concluding that the Tribe had violated the Management Agreement by denying the license application of the Program Director of Miccosukee Indian Bingo, a Tamiami official. Pet. App. 148a. The panel gave the Tribe a choice: it could reinstate Tamiami's Program Director as manager of Miccosukee Indian Bingo, or it could pay Tamiami $9.5 million. *Id.*[4] The Tribe refused to recognize the arbitrators' decision and award.

5. The Second Motion to Dismiss. Meanwhile, back in District Court, the Tribe and the individual defendants moved to dismiss Tamiami's amended complaint, again claiming lack of jurisdiction and sovereign immunity. *See id.* at 149a. The District Court granted the Tribe's motion to dismiss, finding Tamiami's action barred on sovereign immunity grounds. *Id.* at 150a. It concluded, however, that the individual defendants were not entitled to claim immunity from suit and denied their motion to dismiss. *Id.* Tamiami appealed the District Court's dismissal of its claims against the Tribe, and the individual defendants appealed the District Court's order refusing to dismiss the claims against them.

6. *Tamiami II*. In a comprehensive and meticulous opinion, the Eleventh Circuit affirmed the District Court in part and reversed in part. Pet. App. 110a-166a ("*Tamiami II*"). The Court of Appeals first addressed whether the District Court had subject matter jurisdiction over the claims

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[4] The Tribe persists in characterizing the arbitration award as having found in favor of Tamiami on only one claim alleging that "an employee of [Miccosukee Indian Bingo] was improperly terminated." Pet. 5; *see id.* at 16. Its characterization of the award is, to say the least, disingenuous; that "one employee" was the director of the entire Miccosukee Indian Bingo program; his reinstatement thus would have reestablished Tamiami as the manager of Miccosukee Indian Bingo. *See* Ct. App. J.A. Doc. 213, Ex. 1, at 11 (Management Agreement ¶ 3.3.2).

in Tamiami's amended complaint, and concluded that it did: "each of Tamiami's claims * * * 'ar[ose] under the * * * laws * * * of the United States.' " *Id.* at 155a (quoting 28 U.S.C. § 1331).

Tamiami's first claim—that the Tribe had breached its Management Agreement—presented a federal question because "[t]he Agreement incorporates—by operation of law if not by reference—the provisions of IGRA and the [Gaming Commission's] regulations that govern [Miccosukee Indian Bingo's] operations," including those relating to licensing of Tamiami's managers and employees. Pet. App. 155a-156a; *see also id.* n.59. As the Court of Appeals explained, the "gravamen of Tamiami's contract claim" was that the Tribe failed to act in good faith and abused its licensing authority when it denied Tamiami's applications, in violation of IGRA. *Id.* at 156a. Those claims, the court concluded, are "claims arising under federal law; hence the district court had subject matter jurisdiction over Tamiami's breach of contract claim against the Tribe." *Id.*

The Court of Appeals also held that the District Court had subject matter jurisdiction over Tamiami's second and third claims, which were based directly on IGRA and its implementing regulations. *Id.*

Having found that the District Court had properly exercised jurisdiction over Tamiami's claims, the Eleventh Circuit next examined whether the District Court had properly dismissed them. The Eleventh Circuit agreed with the lower court that sovereign immunity barred Tamiami's breach-of-contract claim against the Tribe; while the Tribe had waived its immunity from suits to enforce the parties' arbitration agreement, its waiver did not embrace a contract claim requesting money damages and injunctive relief. *Id.* at 159a-160a. The Court of Appeals noted, however, that Tamiami did not seek an order compelling the Tribe to submit to arbitration in its Amended Complaint, as it had in its original

complaint.[5] Thus, Tamiami "*remain[ed] free, of course, to seek enforcement in the district court of the October 6, 19[illegible] arbitration award and to seek an order in the district court compelling arbitration* of any remaining contract disputes." *Id.* at 160a n.66 (emphasis added).

The Eleventh Circuit also concluded that Tamiami's second claim against the Tribe, brought directly under IGRA and its implementing regulations, was properly dismissed, because IGRA provided no private right of action against the Tribe. *Id.* at 162a. The Court of Appeals affirmed the District Court's conclusion that the individual defendants were not entitled to immunity from suit, leaving for the District Court the question whether Tamiami similarly was barred from stating claims under IGRA against the individual defendants. *Id.* at 164a-166a & n.72.

7. The Second Amended Complaint. Back in the District Court for a third time—and again at the Eleventh Circuit's direction, *see* Pet. App. 160a n.66—Tamiami filed a Second Amended Complaint. Only three of its claims are relevant at this point. The first claim requested "(a) a declaration that all disputes between Tamiami and the Tribe that arise out of or relate to the Agreement—including the licensing dispute—are arbitrable; and (b) a declaration against all of the defendants that the funds in the frozen account belong solely to Tamiami." Pet. App. 87a. The complaint's second and third claims requested judgments compelling the Tribe to comply with the October 1993 arbitration award and to arbitrate other disputes related to the Agreement. *Id.*

The Tribe again moved to dismiss the second amended complaint on grounds of sovereign immunity, lack of subject

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[5] Tamiami had not included a claim to compel arbitration in its Amended Complaint because at the time the Amended Complaint was filed, the parties were in arbitration. *See supra* at 10.

matter jurisdiction, and failure to state a claim. The District Court denied the motions. The Tribe took another interlocutory appeal.

8. ***Tamiami III.*** In June 1999, the Eleventh Circuit issued its third decision. Pet. App. 74a-101a ("*Tamiami III*"). The Tribe argued on appeal that the first three counts of Tamiami's second amended complaint did not state a federal question, because they "merely address contract and arbitration disputes arising under the Agreement." *Id.* at 92a. The Court of Appeals agreed with the Tribe, to a point: "[t]he mere fact that a dispute concerns a contract or an agreement to arbitrate, without more, does not raise a federal question." *Id.* at 93a (citing *Tamiami I*, Pet. App. at 208a, and *Merrill, Lynch, Pierce, Fenner & Smith, Inc.* v. *Haydu*, 637 F.2d 391, 395 (5th Cir. Unit B Feb. 1981)). But the court rejected the Tribe's argument that Tamiami's second amended complaint failed to present a federal question:

> [W]e find that the first three counts of Tamiami's complaint present more than a mere dispute concerning a contract or an agreement to arbitrate. Each of these counts—at least in part—concerns the arbitration of Tamiami's claims that the Tribe had an obligation under the Agreement to process the gaming license applications of Tamiami and its key employees in good faith, and that the Tribe breached its obligations when it rejected these license applications for the sole purpose of taking over [Miccosukee Indian Bingo]. [Pet. App. 93a; *see also id.* at 93a-94a n.10.]

The *Tamiami III* court observed that Tamiami had presented the same claims in its first amended complaint, "albeit in the context of a direct breach of contract suit against the Tribe" rather than a request to compel arbitration, and that the *Tamiami II* panel had concluded those claims presented a federal question "because the Agreement incorporated—by operation of law if not by reference—the provisions of IGRA

and its associated regulations regarding licensing procedures." Pet. App. 94a (citing *Tamiami II*, Pet. App. at 155a). Finding federal law "equally implicated when these claims are presented in the arbitration context" as when presented as part of a contract claim for damages, the *Tamiami III* court held that it was required to "follow the *Tamiami II* panel's conclusion here." *Id.*[6]

Accordingly, because it found that the "first three counts of Tamiami's complaint state a federal question insofar as they relate to the Tribe's rejection of gaming license applications," the Eleventh Circuit allowed Counts One(a), Two, and Three of Tamiami's second amended complaint—the claims against the Tribe for enforcement of the arbitration clause, for enforcement of the arbitration panel's award, and for further arbitration of disputes—to proceed. *Id.* at 94a-95a.

The Tribe sought certiorari of the Eleventh Circuit's decision in *Tamiami III*, asking:

> 1. Whether the federal courts have subject matter jurisdiction over a contract dispute between the management contractor and the Miccosukee Tribe: (a) Does [IGRA] provide management contractors with a private cause of action against Indian Tribes; (b) Did the Eleventh Circuit err in finding that the district court had subject matter jurisdiction over the arbitration alleged to have been conducted pursuant to that contract, and should the Tribe be subjected to litigation when it is clear both on the face of the statute and in the legislative history that no private cause of action exists under IGRA for management con-

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[6] The court was also careful to explain that its decision did not conflict with its prior ruling that Tamiami's *original* complaint did not state a federal question: it was the subsequent licensing dispute, "not the earlier termination dispute[,] that provides a basis for exercising federal question jurisdiction over Tamiami's current complaint." Pet. App. 94a-95a n.12.

tractors? [Pet. for Cert., *Miccosukee Tribe of Indians of Florida* v. *Tamiami Partners, Ltd.*, No. 99-1013.]

Tamiami opposed the petition. It observed, among other things, that the question whether IGRA created a private right of action had been resolved *in the Tribe's favor* by the Eleventh Circuit in *Tamiami II*, and that the Court of Appeals's decision in *Tamiami III* that Tamiami's second amended complaint presented a viable federal question comported with this Court's teachings. Opp. 17-20, 21-26. This Court denied certiorari and denied the Tribe's subsequent petition for rehearing from the denial of certiorari. 529 U.S. 1018 (2000); 529 U.S. 1125 (2000).

On remand to the District Court, both Tamiami and the Tribe moved for summary judgment. The District Court entered judgment for Tamiami, requiring the Tribe to comply with the arbitrators' ruling by paying Tamiami $9.5 million, plus prejudgment interest. Pet. App. 7a-45a.

Once again the Tribe appealed. And once again it raised the arguments it had raised so many times before—that IGRA provided no private right of action and that the Tribe had not waived its immunity from suit. The Tribe also claimed that the arbitral award was unenforceable for a panoply of reasons, including that the tribal court had purportedly "stayed" the final arbitration hearing before it went forward, rendering the subsequent award void under Florida law.

In addition, in one paragraph of its brief, the Tribe for the first time on appeal introduced a new twist on its old subject-matter-jurisdiction refrain: that "a federal court does not have subject matter jurisdiction over an action to compel or stay arbitration merely because the underlying claim raises a federal question." Appellant's Br. 42. It drew inspiration for this new argument from dicta in one footnote in the Eleventh Circuit's 1999 *Tamiami III* opinion, which opined without

elaboration that a court could "look through" arbitration claims to the underlying dispute to discern whether federal-question jurisdiction was available. *See* Pet. App. 94a n.11.

9. ***Tamiami IV.*** The Eleventh Circuit affirmed in an unpublished opinion. Pet. App. 1a-6a ("*Tamiami IV*"). It rejected—again—the Tribe's contention that the District Court lacked jurisdiction to hear the case: "This Court has twice ruled that the district court ha[d] jurisdiction to hear the case because it implicates the Indian Gaming Regulatory Act." *Id.* at 3a (citing *Tamiami II* and *Tamiami III*). Finding "no changes to this case which would divest the district court of jurisdiction," the Court of Appeals held, "for the third time, that the district court had jurisdiction to hear the case." Pet. App. 3a.

The Court of Appeals made equally short work of the Tribe's other contentions, including the Tribe's argument that the arbitration award was void because the arbitration hearing had been "stay[ed]" by the Miccosukee tribal court. *Id.* at 4a. The Eleventh Circuit observed—just as the Tribe itself had previously, *see supra* at 10—that "the arbitration panel's authority came from the parties' agreement, not from the courts. Even Florida courts do not have the power to stay arbitration unless they determine that no arbitration agreement exists." *Id.* at 3a-4a (citing Fla. Stat. § 682.03 and *Mirson* v. *Corradino Group, Inc.*, 751 So. 2d 699 (Fla. 3d Dist. Ct. App. 2000)).

The Tribe petitioned for rehearing and rehearing en banc of the Eleventh Circuit's decision in *Tamiami IV*. The Court of Appeals denied the petition without dissent. Pet. App. 246a-247a.

REASONS FOR DENYING THE WRIT

Compared to the long procedural history of this case, the merits of the Tribe's petition warrant mercifully briefer treatment. The first question presented in the Tribe's peti-

tion—to the extent it is not a rehash of its earlier unsuccessful attempt to seek certiorari—asks the Court to grant certiorari to review dictum in a footnote in the Eleventh Circuit's 1999 *Tamiami III* decision. The second question presented in the Tribe's petition asks the Court to take up issues that are not present in this case and were not pressed or passed upon below.

I. THIS COURT SHOULD DECLINE TO GRANT REVIEW OF DICTUM IN A FOOTNOTE IN *TAMIAMI III*.

1. From *Tamiami I* through *Tamiami IV*, the Eleventh Circuit consistently applied the appropriate standard for determining whether federal-question jurisdiction exists to the particular facts of this complicated case. In each of its decisions the Court of Appeals examined whether the complaint on its face sought a remedy expressly granted by a federal statute or, alternatively, asserted a claim requiring construction of a federal statute. *See Franchise Tax Bd.*, 463 U.S. at 9-10; *T. B. Harms Co.* v. *Eliscu*, 339 F.2d 823, 828 (2d Cir. 1964) (Friendly, J.), *cert. denied*, 381 U.S. 915 (1965). The Court of Appeals concluded in *Tamiami I* that Tamiami's original complaint on its face did not present a federal question, because it challenged only the Tribe's purported termination of the Management Agreement in breach-of-contract terms. Pet. App. 208a (citing *Merrell Dow*, 478 U.S. at 808, and *Franchise Tax Board*, 463 U.S. at 9-10). At the Eleventh Circuit's invitation, Pet. App. 212a, Tamiami remedied that deficiency in its subsequent complaint, which the Court of Appeals found in *Tamiami II* sufficiently implicated IGRA as to create a federal question. *Id.* at 155a-156a.

When the next iteration of Tamiami's complaint, based on the same nucleus of facts and involving the same federal statute, again came before the Court of Appeals in *Tamiami III*, the Court of Appeals correctly concluded that Tamiami's

request for an arbitral remedy did not alter the fact that the complaint still sufficiently implicated IGRA as to pose a federal question. *Id.* at 94a-95a. And the Court of Appeals reaffirmed that holding in *Tamiami IV*, concluding that the District Court properly exercised jurisdiction over Tamiami's complaint "because it implicates the Indian Gaming Regulatory Act." *Id.* at 3a. *See Bruce H. Lien Co.* v. *Three Affiliated Tribes*, 93 F.3d 1412, 1421-22 (8th Cir. 1996) (finding federal-question jurisdiction over suit to compel arbitration of management agreement between Indian tribe and non-tribal operator, on grounds that "the entire association between the parties (and their various disputes) arise under IGRA, and * * * the management agreement at issue, once approved, remains so until disapproved by [the National Indian Gaming Commission]").

The Tribe sought review of *Tamiami III*'s jurisdictional ruling in its first petition for certiorari, and review was denied. 529 U.S. 1018. Now, after *Tamiami IV*, the Tribe has returned with a second petition for certiorari, challenging a *footnote* in *Tamiami III*. In that footnote, the Eleventh Circuit opined that the Federal Arbitration Act permitted the court to " 'look through' Tamiami's arbitration request at the underlying licensing dispute in order to determine whether Tamiami's complaint states a federal question." Pet. App. 94a n.11 (citing 9 U.S.C. § 4). Elevating that 1999 footnote to the "holding[]" of what it has collectively dubbed the "*Tamiami* decisions," Pet. 9, the Tribe now claims that that statement brings the Eleventh Circuit into sharp conflict with some other courts of appeal, which—when confronted with complaints which on their face seek only arbitration of disputes with a federal flavor—have concluded that federal question jurisdiction does not exist. *Id.* at 11-12.

That is meritless. To begin with, the 1999 footnote is dictum. As we observed in our opposition to the Tribe's first petition for certiorari, the Eleventh Circuit reached the conclusion it did in *Tamiami III* for the same reason it had in

Tamiami II: it concluded that Tamiami's complaint on its face presented a federal question because on the facts of this particular case the complaint sufficiently implicated IGRA. Pet. App. 94a-95a; *see id.* at 155a-156a (*Tamiami II*). To conclude that the Eleventh Circuit based its jurisdictional holding not on the complaint, but solely on unspecified federal claims lurking "behind" the complaint—as the Tribe now alleges—this Court would have to find that the Eleventh Circuit in *Tamiami III* abandoned, without acknowledgment, the line of precedent on which it had previously consistently relied, requiring courts to examine complaints on their face to determine whether a federal question exists. The Court of Appeals plainly did not depart from a proper application of the subject-matter jurisdiction standard. The fact that the Tribe did not in any way raise the *Tamiami III* footnote in its prior petition for certiorari from that decision goes far to undermine its present claim that the footnote actually represents the holding below.

The Tribe also argues that the footnote in the Eleventh Circuit's 1999 decision created a "circuit split" warranting certiorari treatment. Pet. 12-13. That is wrong again. First, as we have already observed, the footnote with which petitioner now takes issue does not constitute the holding of the Court of Appeals; it is dicta, and it does not suffice to create a conflict with the holdings of other courts of appeal. *See* Robert L. Stern, *et al.*, *Supreme Court Practice* 225 (8th ed. 2002) ("[T]here must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta").

Even aside from that, the "split" the Tribe posits does not exist. The 1997 Fourth Circuit case to which the Tribe points to justify the "split," *Gibraltar, P.R., Inc.* v. *Otoki Group, Inc.*, 104 F.3d 616 (4th Cir. 1997), did not find federal-question jurisdiction based on disputes underlying a claim for arbitration; it concluded that the disputes did not pose a federal question at all. *See* Stern, *supra*, at 225 (splits should

not be predicated on "inconsistency in dicta"). The only other case the Tribe identifies as contributing to the "split" is a District of Puerto Rico case, *Dean Witter Reynolds, Inc.* v. *Sanchez Espada*, 959 F. Supp. 73, 76 (D.P.R. 1997). This decision obviously does not demonstrate a conflict among the circuits. *See* S. Ct. Rule 10(a) (Court will consider granting certiorari when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals"). And, perhaps most tellingly, the Tribe identifies *no* cases relying on *Tamiami III*'s footnote "holding" to find subject-matter jurisdiction over a complaint that on its face fails to state a federal question.

Nor, finally, should this Court leap at the chance to resolve the purported "circuit split" when the Tribe below aired this issue in just one paragraph in its most recent appeal brief. The Court should decline to grant certiorari on what the Tribe labels an "important question[]," Pet. 8, until a case arrives in which the parties have fully aired the issue, and the lower court has actually rested its holding—not just dropped a footnote—on it.

2. The next portion of the Tribe's petition for certiorari is a point-for-point rehash of its prior petition. *Compare id.* at 17-20 & n.7 with Pet. for Cert. (No. 99-1013) 13-15. In its first petition, the Tribe challenged the Eleventh Circuit's decision finding subject-matter jurisdiction based on IGRA on grounds that IGRA provided for no private right of action. *See* Pet. for Cert. (No. 99-1013) 12-19. The Tribe now argues again that "no federal question is present here because the federal statute invoked, IGRA, does not give [Tamiami] a private right of action against the Tribe." Pet. 17; *see id.* at 18, 19, 20.

Petitioner's arguments again should be rejected. Federal question jurisdiction lies not just when "federal law creates the cause of action," but also when "the plaintiff's right to relief necessarily depends on resolution of a substantial

question of federal law." *Franchise Tax Board*, 463 U.S. at 27-28. *See also Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921) ("where it appears from the [complaint] that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction"); *Columbia Gas Trans. Corp.* v. *Drain*, 191 F.3d 552, 559 (4th Cir. 1999) (complaint poses federal question if it "turn[s] on some construction of federal law") (quotation omitted); *Lindy* v. *Lynn*, 501 F.2d 1367, 1369 (3d Cir. 1974) (noting that "[a]n action arises under the laws of the United States if * * * it requires the construction of a federal statute"); *T. B. Harms*, 339 F.2d at 828. The fact that the federal statute itself may not provide a private right of action is thus not determinative of jurisdiction. *See, e.g., West 14th Street Commercial Corp.* v. *5 West 14th Owners Corp.*, 815 F.2d 188, 196 (2d Cir.) (although federal statute conferred no private right of action, the "federal ingredient" in plaintiff's complaint was "still * * * sufficiently substantial to confer [§ 1331] jurisdiction"), *cert. denied*, 484 U.S. 850 (1987).[7]

We noted in our opposition to the Tribe's first petition that other courts of appeal have concluded, like the Eleventh Circuit, that claims requiring interpretation of IGRA and its implementing regulations present a federal question. Opp.

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[7] *See also Platzer* v. *Sloan-Kettering Inst. for Cancer Research*, 787 F. Supp. 360, 366-367 (S.D.N.Y.) (finding subject-matter jurisdiction over breach-of-contract claim requiring interpretation of federal statute: "even where no private right of action exists for the underlying federal issue, if the nature of the federal issue is sufficiently substantial, subject matter jurisdiction may still exist"), *aff'd*, 983 F.2d 1086 (Fed. Cir. 1992), *cert. denied*, 507 U.S. 1006 (1993); *cf. Milan Express Co.* v. *Western Surety Co.*, 886 F.2d 783, 786-787 (6th Cir. 1989) (claim "ar[o]se[] under an act of Congress regulating commerce" and created jurisdiction under 28 U.S.C. § 1337(a), although act created no private right of action).

(No. 99-1013) at 24-25 (citing *Bruce H. Lien Co.*, 93 F.3d at 1416; *Pueblo of Santa Ana* v. *Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997) ("IGRA is a federal statute, the interpretation of which presents a federal question suitable for determination by a federal court."), *cert. denied*, 522 U.S. 807 (1997); and *Cabazon Band of Mission Indians* v. *Wilson*, 124 F.3d 1050, 1055-56 (9th Cir. 1997) (although "federal courts do not have jurisdiction over run-of-the-mill contract claims brought by Indian tribes," claim based on tribal-state compact, "a creation of federal law" with its scope prescribed by IGRA, presented federal question), *cert. denied*, 524 U.S. 926 (1998)). Nothing has changed since the Tribe's first petition. *See New Mexico* v. *Pueblo of Pojoaque*, 30 Fed. Appx. 768, 769 (10th Cir. 2002) (affirming district court's determination that IGRA provided a "foundation for * * * federal question jurisdiction").[8] This Court should

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[8] *See also Diamond Game Enters., Inc.* v. *Reno*, 9 F. Supp. 2d 13, 16 (D.D.C. 1998) (controversy requiring "interpretation and application of the IGRA" presented federal question), *rev'd on other grounds*, 230 F.3d 365 (D.C. Cir. 2000); *Abdo* v. *Fort Randall Casino*, 957 F. Supp. 1111, 1114 (D.S.D. 1997) (finding federal question jurisdiction over contract dispute because the dispute "involve[d] the manager of an IGRA regulated Indian gaming casino" and an Indian tribe); *Calvello* v. *Yankton Sioux Tribe*, 899 F. Supp. 431, 435 (D.S.D. 1995) (finding federal question jurisdiction where parties disputed whether management contract was governed by IGRA); *Willis* v. *Fordice*, 850 F. Supp. 523, 530 (S.D. Miss. 1994) (suit requiring court to "interpret the provisions of the IGRA" presented federal question), *aff'd*, 55 F.3d 633 (5th Cir. 1995); *Tom's Amusement Co.* v. *Cuthbertson*, 816 F. Supp. 403, 406 (W.D.N.C. 1993) (finding federal question jurisdiction over a contract dispute between a supplier of gaming machines and a management contractor, where the contracts were governed by IGRA); *Ross* v. *Flandreau Santee Sioux Tribe*, 809 F. Supp. 738, 741 (D.S.D. 1992) (finding federal question jurisdiction where "primary focus" of litigation "relates to an interpretation of [IGRA]"); *Rita, Inc.* v. *Flandreau Santee Sioux Tribe*, 798 F. Supp. 586, 587-588 (D.S.D. 1992) (finding federal question

decline to grant certiorari on the same issue it correctly rejected once before—whether the particular facts of this case pose a federal question—when there has been no sea change in the interim warranting a second look at the question.

II. PETITIONER'S CHALLENGES TO THE CONFIRMATION OF THE ARBITRAL AWARD WERE EITHER NOT RAISED BELOW OR NOT PRESENTED IN THE CASE.

A. The Question Whether Tamiami Was Obligated To "Exhaust Tribal Remedies" Was Not Pressed Or Passed Upon Below.

1. The Tribe repeatedly argued in the District Court and the Eleventh Circuit that Florida law permitted the Miccosukee tribal court to stay arbitration, and that the arbitrators' award, which issued after the tribal court had ordered a "stay" of the arbitration proceedings, accordingly was void. *See* Mot. for J. on the Pleadings 8-12; Appellant's Br. 24-27. Citing Fla. Stat. § 682.03, the Tribe argued on appeal that the arbitral hearing "had no validity as a matter of Florida law, because a court which orders arbitration can stay arbitration." Appellant's Br. 24; *see also id.* at 26 (citing Fla. Stat. § 682.03); *id.* (citing Fla. Stat. § 682.03(4)); *id.* at 27 (arguing that "the Tribal Court properly stayed the arbitration pursuant to Fla. Stat. § 682.03(4)"). Section 682.03 of the Florida statutes permits a court, on application, to stay an arbitral proceeding if it concludes "that no agreement or provision for arbitration subject to this law exists." Fla. Stat. § 682.03(4).

In its responsive brief below, Tamiami explained that Section 682.03 did not authorize the tribal court to stay the

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jurisdiction over contract dispute between casino operator and tribe, because the "action involves construing federal laws and the [management] agreement between the parties").

arbitration proceedings. Appellee's Br. 28-36. That statute applies only in situations where "no agreement [to arbitrate] * * * exists," Tamiami explained, and the Tribe had never contended that no agreement to arbitrate existed.[9] Agreeing with Tamiami, the Eleventh Circuit held that "Florida courts do not have the power to stay arbitration unless they determine that no arbitration agreement exists." *Id.* at 4a (citing Fla. Stat. § 682.03). And rejecting the Tribe's contention that the Miccosukee tribal court could stay the arbitration because it had "ordered" the arbitration to commence, the Court of Appeals further noted that the arbitrators' authority sprang not from the tribal court, but solely "from the parties' agreement." Pet. App. 3a-4a.

In its petition for certiorari, the Tribe has understandably abandoned its argument that Florida law permitted the tribe to stay the arbitration and rendered any subsequent award void. It now argues something quite different than it did below: that Tamiami should have been required to "exhaust its tribal court remedies" before it was permitted to sue the Tribe in federal court to enforce the arbitrators' award. Pet. 24-25. Relying on *National Farmers Union Insurance Cos.* v. *Crow Tribe*, 471 U.S. 845 (1985)—a case it did not cite once below—the Tribe argues that the lower courts should have invoked the judge-made "tribal exhaustion requirement" and refrained from taking jurisdiction over Tamiami's

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[9] Tamiami also observed in its appeal brief that Section 682.03 applies only to *state* courts, not *tribal* courts, under the definitional statute governing that provision. *Id.* at 31 (citing Fla. Stat. § 682.18(1)). When the Florida legislature intends to include tribal courts within the ambit of a statute, it makes that intent clear. Appellee's Br. 31 (citing Fla. Stat. § 741.315 (defining "courts of a foreign state" to include tribal courts)); *see also Becenti* v. *Vigil*, 902 F.2d 777, 780 (10th Cir. 1990) (noting that "statutory language referring to actions commenced in 'State court' does not extend to * * * Tribal Court").

claims until the tribal court had an opportunity to pass on its own jurisdiction. Pet. 24-25.

This Court should decline to entertain an argument that was neither pressed nor passed on below. *See FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 224 (1990) ("It is this Court's practice to decline to review those issues neither pressed nor passed upon below"). The Tribe never once made reference, either in the District Court or on appeal, to a "tribal exhaustion requirement." Indeed, only in passing did the Tribe advance the far more general notion that tribal courts in some circumstances may exercise authority over the activities of non-Indians on tribal lands. *See* Mot. for J. on the Pleadings 11 n.8; Appellant's Br. 27; *infra* at 27.

2. In any event, even if the Tribe adequately raised the issue below that it now presses here, the Eleventh Circuit's ruling was plainly right: the tribal court had no authority to "stay" the arbitration proceedings. The Tribe *itself* argued in a pre-hearing submission to the arbitral panel that the panel's authority was "derived *exclusively* from the contract or document creating the panel." *See* Ct. App. J.A. Doc. 311, Ex. 5, at 1 (emphasis added). The Eleventh Circuit was correct to reach the same conclusion. *See McDonald* v. *City of West Branch*, 466 U.S. 284, 290 (1984) ("an arbitrator's authority derives solely from the contract"); *Barnard* v. *Commercial Carriers, Inc.*, 863 F.2d 694, 697 (10th Cir. 1989) (recognizing "well-settled rule" that "the jurisdiction of arbitrators 'to make awards is derived from the agreement of submission' ") (quoting *Continental Materials Corp.* v. *Gaddis Mining Co.*, 306 F.2d 952, 954 (10th Cir.1962)); *Johnson* v. *University of Wisconsin-Milwaukee*, 783 F.2d 59, 62 (7th Cir. 1986) (arbitrator's authority is derived solely from arbitration agreement). Because the authority of the arbitration panel sprang exclusively from the parties' Man-

agement Agreement, the tribal court had no power to order arbitration, much less to stay it.[10]

The fact that the arbitrators were hearing a challenge involving an Indian tribe does not change this result, as the Eleventh Circuit correctly noted. Pet. App. 3a. The Tribe agreed to arbitrate claims relating to or arising under the Management Agreement, and it waived its immunity from suit in federal district court to compel such arbitration or enforce the terms of any award. *See id.* (citing *C & L Enters., Inc.* v. *Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001)).

C. The Question To What Extent A Tribal Court May Adjudicate A Tribe's Claims Against Non-Members Is Not Presented In This Case.

Nor, finally, does this case present a "excellent opportunity" to examine the extent to which a tribal court "has jurisdiction to adjudicate tribal members' claims against nonmembers" arising out of consensual business transactions. Pet. 27, 28. That question is simply not at issue in this case. *See The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180 (1959) (certiorari dismissed as improvidently granted when question presented in petition turned out not to be presented in case). The Tribe sued Tamiami in tribal court back when this saga first began, raising claims related to Tamiami's purported breach of the Management Agreement. *See* Pet. App. 136a. But in October 1993, the Tribe *itself* asked the tribal court to dismiss its action against Tamiami. *See* Pet.

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[10] This Court has also observed that an exception to the tribal "exhaustion" requirement exists when "an assertion of tribal jurisdiction is 'motivated by a desire to harass or is conducted in bad faith.' " *National Farmers Union Ins. Cos.*, 471 U.S. at 856-857 (quoting *Juidice* v. *Vail*, 430 U.S. 327, 338 (1977)). That is exactly what the arbitral panel concluded was going on in this case. *See* Ct. App. J.A. Doc. 311, Ex. 5, at 2-3.

App. 148a-149a (*Tamiami II*). At no time since have there been claims pending against Tamiami in a tribal court.

This Court should not grant certiorari to address what petitioner claims is an "important question," Pet. 29, when the question has been extinct in this case for nine years. *See Rogers* v. *United States*, 522 U.S. 252, 259 (1998) (dismissing writ of certiorari as improvidently granted where "the record does not fairly present the question that we granted certiorari to address"). This Court has more than once declined to address "whether tribes may generally adjudicate against nonmembers claims arising from on-reservation transactions"—a question that presents unique and complicated issues of sovereignty and jurisdiction. *Nevada* v. *Hicks*, 533 U.S. 353, 358 n.2 (2001); *see id.* (noting that Court "avoided the question" in *National Farmers Union Ins. Cos.*, 471 U.S. at 855-856); *id.* at 376 (Souter, J., concurring) (agreeing with petitioners in *Hicks* that "[t]ribal adjudicatory jurisdiction over non-members is 'ill-defined' "). This Court should again decline to take up that complex issue on these tenuous facts, and wait instead for a case in which the issue is ripe and was fully aired below, and which squarely presents the question left open in *Hicks*.

* * *

As the court below explained in its most recent opinion, "Tamiami was awarded $9.5 million in a valid, enforceable arbitration ruling over eight years ago." Pet. App. 6a. Since that time, "the contentious litigation conduct of Miccosukee * * * has delayed payment of this award." *Id.* The time to put a stop to that delay has come.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

JOSEPH M. MATTHEWS
MARC COOPER
COLSON HICKS EIDSON, P.A.
255 Aragon Avenue
Second Floor
Coral Gables, Florida 33134
(305) 476-7400

*Counsel of Record

JOHN G. ROBERTS, JR.*
CATHERINE E. STETSON
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

Counsel for Respondent